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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PERRY KENJI WASHINGTON,

Defendant and Appellant.

F074558

(Super. Ct. No. F16904730)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

C. Athena Roussos, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jeffrey D. Firestone, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE DISSENTING OPINION

Perry Kenji Washington appeals from a single conviction of arson of an inhabited structure.

He argues the trial court erred in failing to dismiss the entire venire after a prospective juror made highly prejudicial comments during voir dire. He further argues the trial court prejudicially erred in admitting prior act evidence to show a common scheme or plan in relation to the charged arson. He also argues the trial court erred in denying his motion for mistrial after a prosecution witness described an inflammatory incident in violation of an in limine ruling excluding all references to that incident. Finally, he makes a claim of cumulative error.

We find merit in Washington's claim that the trial court erroneously admitted prior act evidence to show a common scheme or plan and that this evidence was prejudicial. Accordingly, we reverse Washington's conviction. Our disposition makes it unnecessary to address his remaining contentions.

PROCEDURAL HISTORY

Washington was charged by felony complaint with a single count of arson of an inhabited structure located in Fresno, in violation of Penal Code section 451, subdivision (b).[1] The complaint, which was filed on July 28, 2016, alleged the fire was set on March 30, 2011. Further, pursuant to section 451.1, subdivision (a), the complaint alleged, as an aggravating factor, that gasoline was used to accelerate the fire.

Washington waived preliminary hearing and the case proceeded to jury trial in September 2016. Washington was convicted of the single count at issue, i.e., arson of an inhabited structure. The jury further found that gasoline was used to accelerate the fire.[2]

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[1] Subsequent statutory references are to the Penal Code unless otherwise specified.

[2] Against the wishes of defense counsel, Washington, who was in pretrial custody, attended the trial in a jail-issued jumpsuit. Defense counsel also noted on the record that he had advised Washington to waive his jury trial right in favor of a court trial. Defense counsel further noted he had advised Washington to enter a plea of not guilty by reason

Washington was sentenced on September 19, 2016, to the middle term of five years in prison. The court exercised its discretion under section 1385 to strike the accelerant-use enhancement, for sentencing purposes. The court noted, "the defendant suffers from a condition that does not amount to a defense of the crime but does reduce his culpability for purposes, in this Court's mind, of imposing [a sentence enhancement]." The court awarded credits of 1,001 actual days, 150 days of conduct credits, and 28 days of treatment credit, for a total of 1,179 days of custody credit. Fines and fees were also imposed. In light of the term imposed and the custody credits awarded, Washington would have finished serving his entire sentence by this time.

FACTS

The arson charge at issue in this case relates to a fire that broke out at approximately 4:30 p.m. on March 30, 2011, at the home of Washington's mother, Peryna Washington, on East San Madele Avenue, near First Street, in Fresno.

The prosecution called a total of nine witnesses: Nick Ross (the Washingtons' long-time neighbor on San Madele Avenue); Lawrence French (firefighter); Christopher Garcia (fire investigator); Floyd Wilding (fire investigator); Sarah Yoshida (Department of Justice criminalist); Dominique Comeyne (police officer); Matthew Bogard (police officer); Steven Jacobson (police officer); and Peryna Washington. The defense did not call any witnesses.

Testimony of Nick Ross

Nick Ross grew up on San Madele Avenue in a house diagonally across the street from Peryna's house, where Washington grew up. Ross and Washington were roughly the same age (Ross was 37 years old) and had been neighbors for over 20 years.

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of insanity. Finally, the record discloses that Washington had rejected a prosecution offer that would have made him eligible for Behavioral Health Court (the offer was made before the enactment of § 1001.36, which authorizes a mental health diversion procedure).

Although Ross had moved out of his childhood home, his parents still lived there. Ross and Washington were not friends, just "acquaintances."

On March 30, 2011, Ross came out of the house, with a friend, to go to the gym. As they walked to the car, they noticed "smoke coming out of the back of [Peryna's] house." Ross called 911. A few minutes later, Washington ran out of the front door. There was smoke in the house and Washington was "[t]rying to get out of the house." Ross, who standing in the front yard of the Washington home, asked Washington where his dog was. The prosecutor asked: "And what happened after that?" Ross responded: "[Washington] ran back in the house, and then he came back out. Everything happened kind of fast, so maybe ten seconds, you know, with the dog." Ross reiterated that Washington got the dog out. Ross testified the police arrived within minutes and took Washington "[into] custody."

Ross further testified that a few days before the fire (he could not remember the specific day), Ross was visiting his parents when Washington came over with a "gas can" and asked, "Can I have some gas?" Washington wanted the gas for a "barbecue." Ross told him, "No," and Washington "walked away." Ross added, "I don't know what he did after that."

Ross confirmed that he was familiar with the layout of the Washington home and lot; he had been inside the home and in the swimming pool. He said the home had a back door leading to the swimming pool area. Ross also said there were generally many people going in and out of the house. Peryna also had a boyfriend or male companion who would spend time at the house.

Testimony of Fresno Fire Captain Lawrence French

Lawrence French was a member of the City of Fresno Fire Department. At the time of the Washington home fire, he was the captain of the firetruck company that was initially dispatched to the fire site. French testified that his firetruck company was dispatched at 4:29 p.m. and arrived at the house at 4:33 or 4:34 p.m. French explained:

"When we arrived, we observed a single-story, single-family residential structure with smoke showing from the garage door and multiple openings."

Testimony of Fresno Police Officer Dominique Comeyne

Officer Dominique Comeyne of the Fresno Police Department was dispatched, at 4:40 p.m. on March 30, 2011, to the fire site, to assist with traffic control as the fire department worked to extinguish the fire. Comeyne saw Washington at the scene. After obtaining Washington's name and identification, Comeyne conducted a record check and "found out that there was a restraining order and protection order against him."

Washington told Comeyne that "he was the only person in the house" and that he had been there for "about an hour" before the fire started. Washington also said he did not start the fire, either intentionally or accidentally. However, he admitted "he had been smoking weed inside the residence." Washington said he was in the living room as well as the master bathroom.

Testimony of City of Fresno Fire Investigator Christopher Garcia

At the time of the Washington home fire, Christopher Garcia was a fire investigator with the City of Fresno. He arrived at the fire site, on the day of the fire, at 4:46 p.m. The fire was already extinguished but heat and light gray smoke lingered in the residence. Garcia estimated the "fire burnt anywhere from approximately 9 to 15 minutes" in "total time."

Garcia walked through the home to identify the area of origin and cause of the fire. The home had three bedrooms, two bathrooms, a living room, and a kitchen. Burn damage was limited to one area of the house, in and around the master bedroom. The master bedroom was at the back of the house, at the end of a hallway. The master bathroom was also off this hallway, just before the master bedroom.

With reference to a diagram of the house that he had prepared, Garcia testified the fire originated in the northeast corner of the master bedroom (near the bedroom's doorway and close to the master bathroom). Garcia was unable to identify the specific

spot or item in the master bedroom that was the first to ignite. He did not know whether an object, a piece of paper, or an item of clothing was first ignited. He determined, however, that the master bedroom suffered a subsequent "flashover" event that caused the contents of the room to simultaneously ignite. He explained that a flashover event is caused by smoke buildup; the smoke eventually settles over objects in the room and "preheats" all of them. Some areas of the room were more damaged than others and the items in the room were also not equally affected. The hallway leading to the master bedroom, along with the door of the master bathroom (that was also off the hallway), had some fire damage as well. Other areas of the house simply had smoke marks.

Garcia utilized a "hydrocarbon detector" in conducting his investigation. He explained: "[A] hydrocarbon detector, basically, is, for lack of a better word, a sniffer device that senses the presence of a hydrocarbon." The detector had a wand and both "audible" and "visual" alarms (the latter in the form of "a red flashing light"). He further explained that "many ignitable liquids" contain hydrocarbons, gasoline and butane among them. Garcia noted that gasoline would make a fire burn easier, faster, and hotter.

In light of his conclusion that the fire originated in the northeast corner of the master bedroom, Garcia "wanded" and took samples from both the north and east walls of that bedroom. For control purposes, he also "wanded" and took samples from the south wall. The hydrocarbon detector gave positive responses along the north and east walls and negative responses along the other walls. Garcia subsequently sent the samples he had collected to the "Department of Justice laboratory" to have them "analyzed for ignitable liquids." Garcia explained that when an "ignitable liquid" is used to start a fire, "generally there is residual liquid somewhere to be found."

Garcia summed up his opinion about the cause of the fire. He first noted: "[T]here was a vast amount of damage in the … master bedroom … and I determined that this was the area of origin." He added: "I then employed my … pragmatic hydrocarbon detector." Based on the "positive hits for a hydrocarbon presence in the baseboard area

and in debris on the ground" in the master bedroom, Garcia opined that the fire was "intentionally set," i.e., it was "an arson."

Asked why he decided the fire was not accidental, Garcia said the hydrocarbon detector's "positive readings for a hydrocarbon" had "alerted" him that "this may not be an accidental fire." Furthermore, he concluded the fire was not "accidental" because (1) the master bedroom did not contain "a water heater or some other natural gas device" and (2) his examination of the electrical outlets and ceiling fan in the room did not reveal any problems. Garcia explained: "I didn't notice any electrical problems that I could be aware of without employing a different agency to come and do some forensic electrical testing. I couldn't."

Garcia also observed that in walking through the house, he had seen a can of Zippo lighter fluid on the kitchen counter. He took a photograph of the can but did not take it into evidence. He did not check whether this can was full or empty. In addition, Garcia observed a one-gallon gas can on the living room floor, not far from the kitchen. The gas can smelled of gasoline but contained no collectable liquid. A photograph of the gas can revealed it had an elongated spout or nozzle with no cap. Garcia did not take the gas can into evidence. As for the can of lighter fluid on the kitchen counter, Garcia did not mention or address it in his report.

Testimony of Sarah Yoshida, Senior Criminalist, Central Valley Laboratory

Sarah Yoshida, a senior criminalist at the Department of Justice's Central Valley Laboratory in Ripon, testified that she tested the debris samples received by the laboratory in April 2012. She detected gasoline in the debris sample collected near the east wall of the master bedroom. She did not detect an ignitable liquid in the debris sample collected near the north wall of the master bedroom. As for the control sample from the south wall, no ignitable liquids were detected in that sample. Yoshida clarified that gasoline evaporates easily and depending on how hot a fire is, traces of gasoline in the area would quickly evaporate.

Testimony of Peryna Washington

Peryna Washington testified she had two children, a daughter and a son (Washington). In 2011, she lived at her house on San Madele Avenue with "[her] daughter and sometimes [her] son." She could not recall whether Washington was staying at the house on the day of the fire (March 30, 2011) but said that "probably" he was. Peryna noted that she still lived in her home on San Madele Avenue.

In January 2011, Peryna had obtained a restraining order against Washington because there were times when Peryna could not handle Washington. She described her relationship with Washington: "Uh, my relationship with my son was – uh, sometimes it was good, sometimes it was bad. It was like on and off. A lot of it had to do with other people who were involved." Regarding their relationship in March 2011, Peryna testified: "We had some problems. During the month. I can't say that everyday was a good day. Some days weren't so good. But most days were good. I would say that there was, I think, one occasion – maybe two occasions, we weren't. I called the authorities to have him removed." Peryna explained: "I mean most of the time he was like doing his own thing, but there would be times when he would want to challenge my authority as far as what I could do in my house or how I could do it and then we had – then we had problems. Because I felt like it was my house and I got to make the rules."

Peryna, when asked for a more specific explanation, added: "It wasn't really harassment. It was mostly, like I said, challenging me if I said I wanted to have a certain person at my house, and he might say, I don't like that person and I want to be at home and I don't want that person to be here. And we could have a problem." In fact, "[m]aybe a week" before the fire, Washington was arrested and taken to jail because Peryna had to call the authorities to remove Washington from the house. Asked why the intervention was needed, Peryna said: "Uh, just generally the same kinds of things. I would say like my boyfriend would come over and he would want to mow the lawn. My son wouldn't like my boyfriend. My sister might want to come over and use my

computer. He didn't like my sister. Just different little things, like – they weren't little things, because when he would get angry, it would be – I couldn't reason with him appropriately." Peryna noted that on the occasion in question, Washington was very angry and broke a light fixture with a broom or a mop in his anger. It was for such moments of anger that Peryna had the restraining order. Peryna knew the triggers for Washington's anger, observing that he would become angrier than warranted by certain circumstances.

Washington was released on March 28, 2011, a few days after his arrest for the light-fixture incident. Peryna testified: "[W]ell, what happened was I went down and I picked him up and we had a family discussion. And after the discussion, I told him I would let him think about what was going on. And I did leave the house to let him think about it, so he could think about it." Peryna spent that night in a hotel. Peryna further explained: "I [also saw my son] on the day of the fire and he was very happy that morning, because of discussions we had had the day before. But I wanted to spend the night with my boyfriend. I felt like if he came to the house that night, it would not be a happy scene." Peryna noted her daughter did not get along with Peryna's boyfriend either. Peryna added that she spent that night, i.e., the night after the fire, at a hotel as well. Peryna's testimony regarding the number of nights she spent at a hotel was unclear.

The prosecutor next questioned Peryna, in detail, about a June 2010 incident that occurred in the front yard of the San Madele house. On that occasion, the family was ready to "barbecue up some meat for dinner" when the lighter fluid "r[a]n out" and Washington used gasoline to light the barbecue. The prosecutor repeatedly questioned Peryna about the fact that she had called the police that day, implying that Washington was arrested for the barbecue incident. Peryna's testimony about the June 2010 barbecue incident is addressed more fully later in this opinion.

Peryna testified that the family "usually" kept on hand "at least a little bit of gas" for the lawn mower and weed eater, among other uses. She explained they stored the gas

in a red gas can; the can was kept in the garage unless it was in use. Peryna clarified that, the night before the fire, Washington stayed at her house with her permission, but she was not home when the fire started.

Testimony of Fresno Police Officer Steven Jacobson

Fresno Police Officer Steven Jacobson had a patrol assignment in northeast Fresno in June 2010, as well as the time of trial (September 2016). Jacobson testified that he was dispatched to the Washington home on June 3, 2010, on account of a "disturbance." Jacobson said that Peryna Washington was afraid to return home and described an incident in which Washington "had poured gasoline on their barbecue and on their grass and set it on fire."

Testimony of Fresno Police Officer Matthew Bogard

Fresno Police Officer Matthew Bogard had a patrol assignment in the northeast policing district in March 2011. On March 31, 2011, the day after the fire, he was dispatched to the Washington home because one of the neighbors called the police to report the home was "being burglarized." The caller was a "long-time" neighbor and told the police that the homeowner's son was burglarizing the residence.

Bogard arrived at the house at 4:30 p.m. in his marked patrol car. Bogard spoke to the neighbor who made the call and Washington was detained. At that time Peryna returned home and was surprised to find that her home had suffered fire damage the day before. She was also upset to find Washington there. Peryna said she had been away since Washington was released from jail because she was scared of Washington. For his part, Washington seemed "a bit cavalier" about the whole thing.

Testimony of Floyd Wilding, Fresno Fire Department Fire Investigator

Floyd Wilding, a fire investigator with the Fresno Fire Department, spoke to Nick Ross, a neighbor of the Washingtons', in connection with the investigation into the fire. Wilding said Ross told him that the day before the fire, Washington had asked Ross for some gasoline for purposes of lighting his barbecue. Ross also said that thereafter

Washington crossed the street, apparently in the direction of a neighborhood gas station. Washington returned 15 or 20 minutes later. His gait suggested the gas can had liquid in it.

As part of the investigation, Wilding asked Peryna whether she had given Washington permission to be at her home on the day of the fire. Peryna "said that she didn't remember ever giving him permission to be there."

DISCUSSION

I. June 2010 Incident in which Washington used Gasoline to Light Barbecue

The trial court admitted, under Evidence Code section 1101, subdivision (b), evidence of a prior June 2010 incident in which Washington used gasoline to light a barbecue and some grass in the area accidentally caught fire. The court ruled the evidence of this barbecue-fire incident was admissible to show a common plan or scheme in relation to the charged arson. The court also instructed the jury that it could consider evidence of uncharged acts, if proven by a preponderance of the evidence, to decide whether "[t]he defendant had a plan or scheme to commit the offense alleged in this case."

Washington argues that admission of evidence of the June 2010 barbecue-fire incident was prejudicial error under Evidence Code sections 1101, subdivision (b), and 352. In response, the People first acknowledge, with respect to this incident, that Washington's use of gasoline to light the barbecue was an "innocuous" act and that the resulting grass fire was "accidental." The People further concede that evidence of the June 2010 barbecue-fire incident was erroneously admitted under Evidence Code section 1101, subdivision (b), because that incident was not sufficiently similar to the charged arson to show the existence of a common plan encompassing both incidents. The People contend, however, that the error was harmless.

We agree with the parties that evidence of the June 2010 barbecue-fire incident was erroneously admitted under Evidence Code section 1101, subdivision (b), to show

the existence of a common plan in relation to the charged arson. We further conclude, in light of the way the prosecutor framed her questions to Peryna about this incident as well as the prosecutor's references to this incident in closing argument, that the error was prejudicial.

Evidence Code section 1101 and Evidence of Prior Bad Acts

Evidence Code section 1101, subdivision (a), provides that evidence of prior bad acts "is inadmissible when offered to prove [the defendant's] conduct on a specified occasion." (See *People v. Jackson* (2016) 1 Cal.5th 269, 299-300 (*Jackson*) [""""[Prior bad act evidence] is said to weigh too much with the jury[,] and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."""].)

Evidence Code section 1101, subdivision (b), on the other hand, provides that evidence of uncharged acts is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident) other than [the defendant's] disposition to commit such an act." "In this inquiry, the degree of similarity of criminal acts is often a key factor, and 'there exists a continuum concerning the degree of similarity required for cross-admissibility, depending upon the purpose for which introduction of the evidence is sought: "The least degree of similarity … is required in order to prove intent.…" By contrast, a higher degree of similarity is required to prove common design or plan, and the highest degree of similarity is required to prove identity.'" (*Jackson*, *supra*, 1 Cal.5th at p. 300; see *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 [uncharged act evidence is inherently prejudicial and the question of its admissibility requires "'extremely careful analysis'"].)

""""There is an additional requirement for the admissibility of evidence of uncharged crimes: The probative value of the uncharged offense must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury."""

(*People v. Thomas* (2011) 52 Cal.4th 336, 354; *People v. Lewis* (2001) 25 Cal.4th 610, 637 [“‘“[Evidence of uncharged crimes] is so prejudicial that its admission requires extremely careful analysis”’ and to be admissible, such evidence ‘“must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.”’”]; *People v. Alcala* (1984) 36 Cal.3d 604, 631 [all doubts about the probative value of other act evidence must be resolved in the defendant’s favor]; *People v. Daniels* (1991) 52 Cal.3d 815, 856 [“‘[I]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.’”].)

We review the trial court’s rulings under Evidence Code section 1101 for abuse of discretion. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1114.)

The Trial Court’s Ruling

Prior to trial, the defense filed a motion in limine to exclude evidence of Washington’s uncharged prior bad acts under Evidence Code sections 1101 and 352. The People, for their part, filed a motion in limine to admit prior uncharged conduct under Evidence Code section 1101, subdivision (b). Specifically, the People contended: “The People move to admit evidence of the relationship between Peryna and Defendant, namely that Peryna had a restraining order against Defendant and that she was scared of him because he killed her dogs, had threatened her in the past, and had lit her backyard on fire. The People believe that this relationship is relevant in that it tends to prove: (1) Defendant’s motive to burn his mother’s home pursuant to Evidence Code section 1101[, subdivision] (b), and (2) that Defendant committed this arson with malice.”[3]

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[3] The elements of the crime of arson are set forth in CALCRIM No. 1502. The jury here was instructed pursuant to CALCRIM No. 1502 as follows: “The defendant is charged with arson that burned an inhabited structure in violation of Penal Code section 451[, subdivision] (b). To prove that the defendant is guilty of this crime, the People must prove that: [¶] [(1)] The defendant set fire to or burned a structure; [¶] [(2)] He acted willfully and maliciously; AND [(3)] The fire burned an inhabited structure.” The jury was further instructed: “Someone commits an act ‘willfully’ when he or she does it willingly or on purpose.” In addition, the jury was instructed: “Someone acts

At the hearing on the in limine motions, the trial court asked the prosecutor about the 2010 barbecue-fire incident: "[W]hy would you be offering this incident from 2010?" The prosecutor responded: "To show that Mr. Washington has a, essentially … a common plan or scheme, and that he has this intent, a malicious intent essentially to harass and scare his mother." The prosecutor added: "And I will state that [Peryna] reported to the officers that he had poured gasoline on the barbecue and lit it on fire. And gasoline is the same accelerant alleged in this current case. So I think there is a common plan, I suppose you can say, or a common theme here, as gasoline was used in both of these incidents." Defense counsel countered there was no evidence the 2010 barbecue fire that spilled onto the grass was a deliberate act of arson (rather than an accidental situation) and further observed there was "nothing unique" about using gasoline to light a barbecue and doing so was not a "signature" arson offense.

The prosecutor also noted that later that same day (i.e., the day of the 2010 barbecue fire), Washington had stomped on his mother's puppy and she had called the police. Defense counsel clarified: "It appears as if [the police] were called because of the dog, and when Peryna is interviewed, she mentions the [barbecue] fire incidentally [as] something that had happened earlier that day."

The court ruled that evidence regarding the 2010 barbecue fire was admissible. In doing so, the court stated: "I completely understand the motive element but I don't understand the other bases that were alleged by the People. Now that you're talking common plan and scheme, that does appear to tie in with motive." The court concluded it would admit evidence of the June 3, 2010 barbecue-fire incident "to show motive, that is, to show that any conduct in this incident was intended to annoy or harass Ms. Washington." In addition, the court determined that the probative value of the 2010

'maliciously' when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else."

barbecue-fire incident was not substantially outweighed by its potential for prejudice. However, the court excluded any reference to the dog-stomping incident that "allegedly took place" on this date as well and led to a call to the police.

The court refined its ruling on the barbecue-fire incident in a subsequent discussion with the parties regarding jury instructions. The court stated that evidence of the 2010 barbecue-fire incident was admissible solely to show a common plan or scheme on the part of the defendant. The court made clear that the evidence was not admissible under Evidence Code section 1101, subdivision (b), to show motive, explaining: "When I think of something being a motive, I think of a much more specific connection, where A is being done because of B. Not just that A has taken place and B takes place and the same person is involved and it may show the same type of anger or relationship, *but, rather, that ... the latter one is brought about because of the earlier [one]*." (Italics added.) The court added that it did not "see" the 2010 barbecue-fire incident "as constituting a motive."

The trial court later instructed the jury that the uncharged act evidence could be considered "for the limited purpose of deciding," based on "the similarity or lack of similarity between the uncharged act and the charged offense," whether "[t]he defendant had a plan or scheme to commit the offense alleged in this case." (See CALCRIM No. 375.) The court further instructed the jury to "not conclude from this evidence that the defendant has a bad character or is disposed to commit crime." (See CALCRIM No. 375.)

Evidence Admitted at Trial Regarding the 2010 Barbecue-Fire Incident

The prosecutor asked Peryna numerous questions about the 2010 barbecue-fire incident, focusing on the incident in depth. The phrasing employed by the prosecutor cast the barbecue-fire incident as a deliberate act of arson. For example, the prosecutor's first question, in this context, was: "Do you recall an incident in June of 2010, where your son, Mr. Washington, poured gasoline in your backyard?" Peryna responded: "Uh,

that's not what happened." The prosecutor's subsequent examination included the following questions, among others:

> "[D]o you recall your son lighting the grass and the barbecue on fire?"
>
> "[D]o you recall calling the police because of what your son had done to the grass and the barbecue?"
>
> "[D]o you recall telling the police that your son had poured gasoline on the barbecue and on the grass and purposefully lit it on fire?"
>
> "And that he laughed and said he was barbecuing?"
>
> "And in regards to the gasoline and barbecue incident that we just talked about, did you call the police on your son later that night?"
>
> "After the barbecue, did you call the police to have your son arrested?"
>
> "So you don't recall Officer Steven Jacobson coming to your house and arresting your son?"
>
> "[Even after some gas spilled on the ground] he still continued to light a flame[?]"
>
> "[H]e continued to set it on fire, correct?"

In response to the prosecutor's questions, Peryna clarified that an incident had occurred in the *front* yard involving a barbecue; the incident occurred when Washington was preparing to "barbecue up some meat for dinner" for the family. Peryna stated: "[I]t was in the front yard, and it was – maybe it was 2000 – I don't know, I thought it was 2011. But I don't know. Maybe it was 2010. You know, that's a long way back. But, yes, there was an incident where we didn't have any lighting fluid for the thing, and [my son] was trying to start a barbecue pit with gasoline. I told him that he shouldn't do that, because gasoline is a lot more flammable than lighting fluid is." Peryna, who "was standing right there [at the time]," further explained: "[W]e didn't have any lighter fluid and he didn't want to wait"; the lighter fluid had "run out."

Peryna noted she did not call the police for this incident because it was more of a situation where Washington was "testing [her] authority." She observed: "And if I tell him, don't use gasoline to set the barbecue, you know, let me go get some lighter fluid, he doesn't want to wait for me to go get lighter fluid, he wants to use gasoline." Peryna said she had the following exchange with Washington: "I had told him to use lighter fluid. He said, oh, yeah, it's all right. I said, well, don't put any more gasoline on it. He said, I'll just put a little more, make sure it lights well. And that is when he put a little more on it, but he spilled it on the grass and the sidewalk." She clarified: "He spilled it on the sidewalk accidentally" through the "little spout" on the "gas can." Peryna felt it was "a dangerous situation."

Peryna noted the barbecue was a small "hibachi" grill that sat on the ground. The fire in the barbecue had "flamed up about five feet in the air," going "all the way" to "the eaves of the house" because "there was so much gasoline in the barbecue." Eventually, the fire died down, leaving embers suitable for purposes of barbecuing. She added: "I told [Washington] he had too much gasoline, yes. And he did." Peryna further explained: "[S]ome of the fire jumped out of the [hibachi] and he had to get … the water hose to wash it away." He also "washed off the sidewalk where the gasoline had spilled on the sidewalk." Peryna concluded: "He actually did [the] barbecuing [then], he fixed some food. Which tasted like gasoline, which is why I told him don't use the gas."

The prosecutor called Officer Steven Jacobson, evidently to impeach Peryna's testimony. Jacobson testified that at an unspecified time on June 3, 2010, he was dispatched to the Washington residence because Peryna was afraid to return home. Peryna mentioned that, earlier in the day, Washington had poured gasoline on the barbecue and grass but had quickly extinguished the resulting fire, saying he was barbecuing.

Jacobson did not address, in any detail, the reason he was dispatched to Peryna's house; however, the prosecutor and defense counsel had discussed the relevant

circumstances during the in limine motions hearing. At that hearing, counsel indicated that Jacobson's report suggested the police were called for an incident involving Peryna's dog and that Peryna advised the police that a barbecue fire had also occurred earlier in the day.

Prosecutor's References to 2010 Barbecue-Fire Incident in Closing Argument

In her closing argument, the prosecutor laid out the three elements of the offense of arson of an inhabited structure: "The first element is that the defendant set fire to the property. The second element is that when he set fire to the house, he acted willfully and maliciously. And the third element is that he burned an inhabited structure." The prosecutor repeatedly referred to the 2010 barbecue-fire incident in connection with the second element of the offense, i.e., that the defendant acted willfully and maliciously, which the prosecutor explained basically meant that the fire was "not an accident" *and* was done either as "[an intentionally] wrongful act" or "with the [unlawful] intent to injure or annoy [the defendant's] mom."[4]

Regarding the second element of the offense, i.e., that the defendant acted willfully and maliciously, the prosecutor argued: "And [the defendant's] got a plan here when setting this fire. And it's the same plan he's had all along. He threatens [his mother]. He injures her. He causes her pain. He harasses her. *And this fire is obviously on a way bigger scale than what he has done in the past. But it still goes along with his common theme, his common plan that he has*." (Italics added.) Thereafter, the prosecutor repeatedly emphasized that the 2010 barbecue fire and the 2011 fire underlying the instant arson charge were part of a common scheme or plan, on Washington's part, to harass his mother *by using gasoline*.

For example, the prosecutor argued: "[The defendant] started this fire with gasoline to harass his mom, just like he had done in the past. [¶] We heard about an

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4 The elements of arson are delineated in footnote 4, *ante*.

incident from back in June, 2010, where he was lighting the barbecue on fire with gasoline. And the barbecue lit on fire, the sidewalk, and the grass as well. And Mrs. Washington told us, she said, I told him not to use gasoline on the barbecue. *He got lighter fluid in the house, but he chose to use gasoline against her instructions anyway. He refused to use the lighter fluid.*[5] He used an extremely flammable source, gasoline, to light [the] barbecue on fire. It caused a five-foot flame and she called the cops. *And again, this is all part of a plan to kind of harass and hurt his mom.* And he seemed to have access to this gasoline, he knows where to get the gasoline. *He did it back in June 2010, just as he did it back on March 30th, 2011. Gasoline and fires are part of his plan*." (Italics added.)

The prosecutor further argued: "And we know that [the defendant] had access to gasoline from back in June of 2010, when he set fire to the barbecue, the grass and the sidewalk with this gasoline. Which I submit to you is not a normal thing to do. I don't think people typically start barbecues with gasoline. But I think he did this because his mom told him no and he felt like he was going to do what he wanted to do. *So he lit it on fire, the sidewalk, the grass, the barbecue, against his mom's orders. And I think she testified that the flames went so high that they even burned the eaves of the house.*[6] *So Mr. Washington clearly has a plan here with gasoline, and it's to go against what his mom wants.* And again, Mrs. Washington said that they kept the gas can in the garage and she said they did not keep it in the living room."[7] (Italics added.)

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5 The prosecutor misrepresented the evidence on this point as Peryna clearly and repeatedly testified that Washington used gasoline to light the barbecue because the lighter fluid had "run out." There was no evidence that Washington refused to use lighter fluid that was present at the house.

6 The prosecutor overstated the evidence as Peryna had simply testified that the flames from the barbecue went up to the "eaves of the house"; she did not testify that the flames burned or even touched the eaves.

7 When asked where the gas can was stored, Peryna responded: "In the garage. Normally. When we're not using it."

In wrapping up her argument, the prosecutor again commented that the charged arson was "just one incident in a long stream of incidents … between [Washington] and his mom." She observed: "He took that gas can *that he had held so many times before* and he poured it over his mom's bed and on the floor and in her closet, and then he took a match, or a lighter, or something like that, and set it on fire." (Italics added.)

In her rebuttal argument, the prosecutor similarly argued that the 2010 barbecue-fire incident and the 2011 master-bedroom fire were part of a common scheme on Washington's part to use gasoline to harass his mother. The crux of her argument was that if the jury found Washington had caused a fire in his mother's yard, it could reasonably infer he had committed arson in his mother's bedroom.

Specifically, the prosecutor argued: "In talking about the barbecue incident from about a year before the fire, again, [defense counsel] conceded in his statement to you, he said, Mr. Washington started the barbecue fire to annoy his mom. [Defense counsel] said that. Yes, he did do that to annoy his mom. His mom said don't do it, and he did it anyway. It is a show of defiance. It is a show of control. And [defense counsel] said gasoline is a way of asserting himself against his mom.[8] *I couldn't agree more. He uses gasoline as a way to show his control over his mom. [¶] He has a history of lighting fires to annoy and injure his mom. And, again, remember [the] barbecue incident a year prior, Mrs. Washington called the police on her son and reported that incident to the police*."[9] (Italics added.)

The prosecutor acknowledged that precisely how the instant 2011 fire started was unknown; in other words what took place inside the house on the afternoon in question represented a black box. She stated: "Now, the March 30th fire, the March 30th, 2011

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8 Defense counsel argued the barbecue fire was not a deliberate arson but, rather, represented an attempt by Washington to assert himself vis-á-vis his mother.

9 The record suggests the police were called that day on account of an incident involving Peryna's dog that took place after the barbecue fire had occurred.

[fire], again, no one was there except Mr. Washington. We weren't there. I wasn't there. And [defense counsel] brought up the fact that this was a bigger production than what Mr. Washington's ever done before. And yes, it was a large fire. But, again we don't really know how that fire started. We know where, approximately, it started, but for argument's sake, for example, he could have taken some clothes from the closet, thrown them on the floor, put some gasoline on top and lit a small fire. And because of all the gasoline that was used, it developed into a larger fire. And it may be what was intended, I don't know. We weren't there. But the fact of the matter remains that a fire was started and it turned into something huge and probably something that Mr. Washington couldn't control. That is why he ran out of the house, because it engulfed the house and he couldn't keep it under control."

The prosecutor continued: "[Defense counsel] brought up the point that just the day before the fire, Mr. Washington was walking around the neighborhood with a gas can. And who would do that, right? If you were going to set fire to your mom's house, why would you walk around with a gas can in front of everyone? Well, [defense counsel] described his own client's behavior as frivolous, I believe, and you can't really predict what he is going to do, all over the place. I forget the exact words that he used. So maybe it makes sense that this is what he was doing. And I don't know when he formed the desire or the intent to light his mom's bedroom on fire. But the fact of the matter remains that he did do so, and he did so with the wrongful intent. *He did so because he wanted to injure and annoy his mom like he had done so many times before*." (Italics added.)

The prosecutor argued that Washington's use of gasoline in the grass fire in 2010, revealed a malicious motive for the charged arson. Specifically, she said: "[I]n this case there is a motive and there is a clear motive. *And, again, it's to do to his mom what he had done in the past.* He had already harmed her with gasoline, as [defense counsel] conceded, to assert control and – I forget the words he used. *The time before, with the*

barbecue incident, he said gas is a way of asserting himself against his mom. So, again, it is just in line with this common plan that Mr. Washington has." (Italics added.)

The prosecutor concluded: "The bedroom, again, a very special place in the home, was torched with gasoline. Gasoline that [defense counsel] conceded was used during the fire. Gasoline that we know Mr. Washington had in his hand the very day before *and a year before. And we know that Mr. Washington had set fires in the past to annoy his mother. That's what happened here. It was just one more act in a long series of incidents with mom.* [¶] … *No one else had the motive except for him. The motive was to harass and control his mother through anger, fear and gasoline.*" (Italics added.)

Admission of 2010 Barbecue Fire Evidence was Erroneous

"[E]vidence of a common design or plan is admitted … to prove that the defendant engaged in the conduct alleged to constitute the charged offense." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 399 (*Ewoldt*).) Such evidence establishes that a plan used in committing various uncharged offenses was also used to commit the charged offense. Stated differently, it proves that the defendant committed the charged offense "pursuant to the same design or plan used in committing the uncharged criminal acts." (*Ibid*.) In short, the existence of a common plan tends to show that the defendant committed the unlawful act alleged. (*Id.* at p. 394, fn. 2.)

"[E]vidence of defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan." (*Ewoldt*, *supra*, 7 Cal.4th at pp. 401-402.) "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Id*. at p. 403.) Furthermore, the "evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, *but such a concurrence of common features* that the various acts are naturally to

be explained as caused by a general plan of which they are the individual manifestations.'" (*Id*. at p. 402, italics added.)

As stated above, Washington argues that the trial court erred in admitting evidence of the 2010 barbecue fire pursuant to Evidence Code section 1101, subdivision (b), to show that both the barbecue fire and the 2011 house fire were part of a common plan or scheme. The People, candidly, concur with Washington that the trial court erred in admitting evidence of the barbecue-and-grass fire to show the existence of a common plan or scheme with respect to the charged arson. The People acknowledge the evidence was improperly admitted for this purpose because the "evidence of the 2010 fire showed that it was accidental" and, furthermore, it "lacked a sufficiently high degree of common features with the charged arson to warrant an inference that if [Washington] committed the 2010 fire, then he also committed the arson." (See *People v. Cramer* (1967) 67 Cal.2d 126, 129-130[10] [evidence of a prior crime offered to prove common scheme or plan is admissible when "there is some clear connection between that offense and the one charged so that it may be logically inferred that if defendant is guilty of one he must be guilty of the other"]; *People v. Ward* (1968) 266 Cal.App.2d 241, 255.)

Here, the evidence shows that during the 2010 barbecue-fire incident, Washington poured gasoline into an outdoor hibachi grill, spilling some of it on to the nearby grass and causing the grass to catch fire. All this occurred in Peryna's presence. Washington quickly extinguished the fire and proceeded to barbecue some food. *Both parties agree this fire was accidental*. In contrast, the charged offense concerned a fire within the house itself, in the master bedroom. The fire occurred when Peryna was away and caused far more serious property damage. This fire was *alleged to have been intentionally set* to damage or destroy Peryna's house and/or other property.

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10 *People v. Cramer* was "impliedly disapproved" on other grounds by *People v. Thompson* (1980) 27 Cal.3d 303, 317, as noted in *People v. Tassell* (1984) 36 Cal.3d 77, 89, fn. 8).

The only feature common to both fires appears to be the presence of gasoline. In the first incident, gasoline was used to light the barbecue, but the nearby grass accidently caught fire. As for the house fire, after it was extinguished, gasoline was detected in one area of the master bedroom. However, although gasoline was involved in both incidents, this similarity was undercut by critical differences between the two incidents.

First, there was a significant difference in the seriousness of the two incidents. In one incident, gasoline was used to light a barbecue to cook food; indeed, the People characterize Washington's use of gasoline to light the barbecue in the earlier incident as "innocuous." In the other incident, gasoline was allegedly used to burn down a house or other property. Second, the People note that the spillage of gasoline onto the grass during the barbecue incident and the consequent short-lived fire were "accidental" situations, as evident from Peryna's testimony about the incident and the fact that Washington quickly extinguished the grass fire. In contrast, the charged house fire was alleged to be a willful and malicious attempt to destroy Peryna's property.

In light of the important differences between the barbecue-fire incident and the alleged arson of the house, we agree with the parties that the two fires were not sufficiently similar to constitute a common plan. The court thus erred in admitting evidence of the 2010 grass fire for purposes of showing that the two fires constituted a common plan or scheme, executed by Washington, to employ gasoline to harm his mother.

Admission of the 2010 Barbecue Fire was Prejudicial

Washington further contends that the erroneous admission of evidence of the barbecue-fire incident was prejudicial under the *Watson* standard of prejudice that applies in assessing prejudice from the improper admission of evidence of uncharged acts. (*People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.) The People argue that admission of evidence of the 2010 barbecue-fire incident was not prejudicial because "barbecuing with gasoline" was

"innocuous" and "the *accidental* grass burning did not evince a plan or scheme," and, consequently, "the jury would not have given [this evidence] any weight." (Italics added.) We conclude the erroneous admission of evidence of the 2010 barbecue-fire incident was indeed prejudicial, in that absent the admission of this evidence, there is a reasonable chance Washington would have obtained a more favorable outcome.

Although the jury was instructed to consider evidence of uncharged prior acts only as to the existence of a common plan or scheme and not as propensity evidence, the instruction did not explain how the evidence of the 2010 barbecue-fire incident might tend to show a common plan or scheme. That void was filled by the prosecutor, who cast the 2010 barbecue-fire incident as a prior act of arson and repeatedly argued that the barbecue fire and the instant house fire were "individual manifestations" of Washington's overarching plan to use gasoline to injure his mother. (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.) In other words, she argued that Washington had willfully and maliciously set his mother's property on fire in 2010 and, repeating a pattern, did so again in 2011.[11]

As stated above, on appeal, the People acknowledge that the barbecue-fire incident and the charged arson were *not* sufficiently similar to support such an inference because the use of gasoline in the barbecue was innocuous and the consequent grass fire was accidental. However, at trial, the erroneous admission of evidence of the barbecue-fire incident and the corresponding instruction given to the jury, permitted the prosecutor to argue, to the contrary, that the prior fire and the charged arson were both intentional fires that were individual manifestations of a common plan. Under these circumstances, the

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11 For example, as noted above, in making her final comments to the jury, the prosecutor said: "The bedroom, again, a very special place in the home, was torched with gasoline. Gasoline that [defense counsel] conceded was used during the fire. Gasoline that we know Mr. Washington had had in his hand the very day before *and a year before*. *And we know that Mr. Washington had set fires in the past to annoy his mother*. *That's what happened here. It was just one more act in a long series of incidents with mom.* [¶] … *No one else had the motive except for him*. *The motive to harass and control his mother through anger, fear and gasoline.*" (Italics added.)

court's limiting instruction to the effect the jury was not to infer, from the prior bad act evidence, that the defendant was disposed to commit crime, was of little value. (See *People v. Dellinger* (1984) 163 Cal.App.3d 284, 300 ["the courts have recognized that limiting instructions are frequently inadequate to protect the accused"]; CALCRIM No. 375.)

The prosecutor further argued that, in addition to signifying a common plan with the charged arson, the barbecue-fire incident also tended to prove a motive for the charged arson. She argued: "[I]n this case there is a motive and there is a clear motive. *And, again, it's to do to his mom what he had done in the past.... The time before, with the barbecue incident [shows that] gas is a way of asserting himself against his mom.*" (Italics added.) Although the charges in the instant case were far more serious than the prior conduct, the prosecutor was able to argue that both incidents involved intentional fires on Peryna's property that were part of a common plan and, *also*, that the prior incident reflected a *motive* to commit the charged arson.

The erroneous admission of evidence of the barbecue-fire incident not only permitted the prosecution to articulate an improper theory to prove the charged arson, it also limited the defense's ability to present a persuasive theory of defense. The improperly-admitted evidence, the related jury instruction, and the prosecutor's argument that Washington had a longstanding plan to use gasoline to injure his mother, severely limited the defense's ability to posit a theory of defense to the effect that Washington had accidentally or carelessly started the house fire. On the contrary, counsel was effectively forced to rely on a far less viable theory of defense, i.e., that an unknown person had committed the arson. Counsel was also obligated, on account of admission of evidence of the prior barbecue/grass fire, to address it in his closing argument, thereby drawing additional attention to the incident and, in turn, prompting the prosecutor to refocus on the incident with increased vigor in her rebuttal argument.

It is also significant that the case against Washington, as in most cases of arson, was circumstantial. The prosecution's fire expert, Christopher Garcia, clarified that he concluded the fire in the master bedroom of Peryna's home was an arson because his hydrocarbon detector alerted to the presence of gasoline. Garcia also conducted a limited inspection of electrical outlets and fixtures in the room, which appeared intact to him. However, Garcia could not say precisely where or how the fire started or what object or spot in the room first ignited. Garcia also indicated that, given the alerts from his hydrocarbon detector, he did not contact the relevant agencies for a forensic examination of electrical and other systems in the room. Garcia's assumption that the presence of gasoline and the absence of obvious electrical defects, without more, established that the fire was set willfully and maliciously, is a common assumption in arson investigations. However, this assumption does not apply as readily in cases such as this one, where the defendant exhibited atypical behavior.

Furthermore, Washington did not run away from the scene after the fire broke out. He exited the house by the front door and when asked about his dog, ran back in and rescued the dog. He also remained at the scene when fire personnel and the police arrived and spoke with them.

To recapitulate, under the applicable circumstances, the erroneously admitted evidence was a significant factor in the prosecution's case and was highlighted and embellished by the prosecutor. (See *People v. Dellinger*, *supra*, 163 Cal.App.3d at p. 300 [potential for prejudice exacerbated by prosecutor's repeated references to prior crime evidence].) The erroneously admitted evidence also constrained, if not eliminated, the defense's ability to argue the house fire was accidental, not willful and malicious. We are mindful, further, that evidence of prior crimes or bad acts is inherently prejudicial. Such evidence has a "'"highly inflammatory and prejudicial effect" on the trier of fact'" and "'produces an "over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts."'" (*People v. Holt* (1984) 37 Cal.3d

436, 450-451; *People v. Sam* (1969) 71 Cal.2d 194, 206 ["substantial prejudicial effect [is] *inherent* in evidence of prior offenses" (italics added)].)

Considering the foregoing factors, there is a reasonable chance that, had evidence of the barbecue-fire incident been excluded and the related "common plan" jury instruction omitted, the result of the proceeding would have been more favorable to Washington. (See *People v. Wilkins* (2013) 56 Cal.4th 333, 351 [application of *Watson* standard requires an """""examination of the entire cause,""""" including the evidence, instructions, and arguments of counsel]; *People v. Soojian* (2010) 190 Cal.App.4th 491, 521 [indicating that, for purposes of *Watson* standard, "a hung jury is a more favorable result than a guilty verdict," and, in turn, that the standard is met when there is a reasonable chance the absence of error would change a single juror's mind].)

In sum, the prosecutor was able to argue that Washington deployed gasoline in the 2010 barbecue-fire incident to commit an arson and, repeating the pattern, again used gasoline to commit the charged 2011 arson. On appeal, the People concede the prior grass fire was accidental and suggest it therefore was not prejudicial—but the People cannot have it both ways. We conclude the erroneous admission of evidence of the barbecue-fire incident was prejudicial. Washington's conviction is therefore reversed.

II. Washington's Remaining Contentions

Our disposition makes it unnecessary to resolve Washington's remaining contentions. Among the other issues he raises on appeal, he challenges the trial court's denial of a motion for mistrial made by his trial counsel. Counsel made the mistrial motion after a police officer, called as a witness by the prosecution, testified that Peryna told him, the day after the fire, that she left her home earlier that week "because she was afraid of [Washington] [as] two dogs [had] ended up drowned." The officer's testimony about the drowned dogs violated an in limine ruling excluding all references to the dogs. Washington argues the trial court's denial of his mistrial motion constitutes reversible error, as the officer's suggestion that Peryna was frightened of him because "two dogs

had drowned" at her house, implied Washington had maliciously killed the dogs, which was a highly inflammatory implication that rendered his trial fundamentally unfair.

Washington also argues the trial court erred in failing to dismiss the venire after a prospective juror made prejudicial remarks during voir dire. The prospective juror explained that he could not be fair to Washington. Specifically, the prospective juror stated in open court: "Because where you guys said the crime had took place, my mother lived like one street over and had some of her trash cans caught on fire, and then a couple [of] other incidents. And then we moved her out. And then he is here for arson. So I kind of thought about it, maybe he was [the] one, because when that did happen it was an African-American male that did it, so – and they never caught him. *And my mom moved out because she was scared, because it almost caught her house on fire, too*. So then I started thinking about it, and that was around the time, it was in February of that year, so I was thinking, well, maybe that could be him." (Italics added.)

Finally, Washington makes a cumulative error claim. Each of these claims would have deserved more of our attention had we not found error and prejudice in Section I.

DISPOSITION

The judgment is reversed.

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SMITH, J.

I CONCUR:

_____
DESANTOS, J.

POOCHIGIAN, J., Dissenting.

I respectfully dissent to the issue on which the majority bases its reversal of defendant's conviction in this case. Accepting the People's concession that the trial court erroneously admitted evidence of defendant's prior act in 2010 involving the barbeque and the gasoline, I would find the court's error was not prejudicial and does not require reversal.

A. Evidence Code Sections 1101 and 352

While the People have conceded the prior acts evidence was erroneously admitted, a brief review of the provisions of Evidence Code sections 1101 and 352 is in order to address the ultimate issue of whether the error was prejudicial.

In general, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).)

"Cases sometimes describe Evidence Code section 1101(b) evidence as 'prior offenses' or 'prior bad acts.' Both shorthand formulations are imprecise. Evidence Code section 1101, subdivision (b) "authorizes the admission of 'a crime, civil wrong, *or other act*' to prove something other than the defendant's character. (Italics added.) The conduct admitted under Evidence Code section 1101(b) need not have been prosecuted as a crime, nor is a conviction required. [Citation.]" (*People v. Leon* (2015) 61 Cal.4th 569, 597; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 393; *People v. Moore* (2016) 6 Cal.App.5th 73, 92; *People v. Cole* (2004) 33 Cal.4th 1158, 1194–1195 (*Cole*); *People v. Davis* (2009) 46 Cal.4th 539, 602.)

"The admissibility of uncharged acts ' "depends upon three principal factors: (1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence." [Citation.]' [Citations.]"

(*People v. Moore*, *supra*, 6 Cal.App.5th at p. 92; *People v. Daniels* (1991) 52 Cal.3d 815, 856; *People v. Fuiava* (2012) 53 Cal.4th 622, 667–668.)

Such evidence " 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' [Citations.] 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have *substantial* probative value.' [Citation.]" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) "Because this type of evidence can be so damaging, '[i]f the connection between the [prior act evidence] and the ultimate fact in dispute is not clear, the evidence should be excluded.' [Citation.]" (*People v. Daniels*, *supra*, 52 Cal.3d at p. 856; *People v. Fuiava*, *supra*, 53 Cal.4th at pp. 667–668.)

"Moreover, to be admissible, such evidence ' " 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.' " ' [Citations.] Under Evidence Code section 352, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citations.]" (*Cole*, *supra*, 33 Cal.4th at pp. 1194–1195.)

B. <u>Evidentiary Errors</u>

"We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352. [Citations.]" (*Cole*, *supra*, 33 Cal.4th at p. 1195; *People v. Thompson* (2016) 1 Cal.5th 1043, 1114.) The court abuses its discretion when its ruling falls outside the bounds of reason. (*People v. Carter* (2005) 36 Cal.4th 1114, 1149.)

On appeal, the trial court's erroneous admission of prior acts evidence under Evidence Code section 1101 is reviewed pursuant to *People v. Watson* (1956) 46 Cal.2d 818, 836–837 (*Watson*). (*Cole*, *supra*, 33 Cal.4th at p. 1195; *People v. Welch* (1999) 20 Cal.4th 701, 749–750; *People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Lopez* (2011) 198 Cal.App.4th 698, 716; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018–1019.)

An error under Evidence Code section 352 is similarly evaluated under the *Watson* standard. (*People v. Earp* (1999) 20 Cal.4th 826, 878.)

"We do not reverse a judgment for erroneous admission of evidence unless 'the admitted evidence should have been excluded on the ground stated and … the error or errors complained of resulted in a miscarriage of justice.' [Citations.]" (*People v. Earp*, *supra*, 20 Cal.4th at p. 878.) Under the *Watson* standard, "a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, *supra*, 46 Cal.2d at p. 836.) " ' "[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." ' [Citation.]" (*People v. Jandres* (2014) 226 Cal.App.4th 340, 360.) "Appellate review under *Watson* … focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)[1]

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[1] "[G]enerally, violations of state evidentiary rules do not rise to the level of federal constitutional error. [Citation.]" (*People v. Benavides* (2005) 35 Cal.4th 69, 91, fn. omitted; *People v. Abilez* (2007) 41 Cal.4th 472, 503.) "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.] Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Defendant has not claimed the evidentiary error in this case violated his federal due process rights.

Defendant's Arguments About Prejudice

On appeal, defendant asserts the court abused its discretion when it admitted the evidence of his prior act with the gasoline and the barbeque because the incident inadmissible under section 1101 and highly prejudicial under section 352. As noted, the People have conceded the trial court's evidentiary error, and I agree.

As for the standard of review of this error, defendant declares that "[e]rroneous admission of uncharged misconduct is almost always prejudicial," "it is well settled that evidence of other crimes evidence is inherently prejudicial," and the prejudice "stems not only from the inflammatory nature of the evidence but also from the likelihood that the evidence would over-persuade and cause the jury to convict based on extraneous facts."

As noted above, the California Supreme Court has repeatedly cautioned that when a trial court considers the admissibility of prior acts evidence, it is " 'so prejudicial that its admission requires extremely careful analysis' " (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404), and " ' " '[i]f the connection between the [prior act evidence] and the ultimate fact in dispute is not clear, the evidence should be excluded.' [Citation.]" [Citation.]' " (*People v. Thompson, supra*, 1 Cal.5th at p. 1114; *People v. Daniels, supra*, 52 Cal.3d at p. 856; *People v. Fuiava, supra*, 53 Cal.4th at pp. 667–668.) Once a reviewing court determines the admission of such evidence was erroneous and an abuse of discretion, however, the evidentiary error does not mandate reversal but instead requires the determination of whether the error is prejudicial under *Watson* based on the other, properly-admitted evidence and other circumstances of that particular case. (*Cole, supra*, 33 Cal.4th at p. 1195; *People v. Malone, supra*, 47 Cal.3d at p. 22; *People v. Lopez, supra*, 198 Cal.App.4th at p. 716; *People v. Scheer, supra*, 68 Cal.App.4th at pp. 1018–1019.)

As an example, *Cole, supra*, 33 Cal.4th 1158 addressed the defendant's argument in a capital case that the trial court abused its discretion when it admitted evidence that the defendant had been convicted of two acts of cohabitant abuse against the victim. The

trial court admitted the evidence and found it was relevant under Evidence Code section 1101, subdivision (b) to prove the defendant's intent for the murder/torture special circumstance, and not prejudicial under Evidence Code section 352. An officer testified about the facts of those two prior incidents. (*Id*. at pp. 1193-1195.)

Cole assumed "for the sake of argument" that the court abused its discretion when it admitted the evidence of the defendant's two prior acts, but held the error was not prejudicial under *Watson* because "there was abundant testimony" that the defendant's relationship with the victim was acrimonious, they constantly fought, and his actions and statements on the day of the murder provided evidence of his intent, and "it is not reasonably probable that a result more favorable to defendant would have resulted" if the evidence had been excluded. (*Cole, supra*, 33 Cal.4th at p. 1195.) The defendant also claimed the admission of the evidence violated his due process rights, but *Cole* held that for the same reasons, any error would be harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Cole, supra*, 33 Cal.4th at p. 1195.)

C. <u>The Trial Court's Evidentiary Error was not Prejudicial</u>

As in *Cole*, I would find it is not reasonably probable a result more favorable to defendant would have been reached absent the error. Acknowledging the majority opinion's summary of the trial court's ruling, the prior acts evidence, and the discussion of this evidence in the parties' closing arguments (maj. opn., *ante*, at pp. 13–22), I would find the following facts adduced at trial establish extremely strong circumstantial evidence that defendant started the fire inside his mother's house, entirely independent of the court's erroneous admission of the prior acts evidence.

While there were no witnesses who saw defendant personally ignite the fire, the following evidence showed it was arson: The fire was started with gasoline in the master bedroom; defendant was seen bringing an apparently full can of gasoline into the house the day before he fire; he left the area when the house was on fire; he gave inconsistent and false statements to an officer when he returned to the burning house; he ultimately

admitted that he was in the house; next to the master bedroom, immediately before the fire ignited; and Ms. Washington told officers that she had not been in the house for three days before the fire started. Thus, a miscarriage of justice did not occur, and it is not reasonably probable that a result more favorable to defendant would have resulted if the evidence had been excluded.

The Cause of the Fire

At trial (and on appeal), the defense did not dispute the People's evidence that the fire originated in the master bedroom, it was intentionally set, and gasoline was used as an accelerant.[2] Officer Christopher Garcia, the fire investigator, testified the master bedroom was the "room of origin." The "area of origin" was between the bed and the wall, at the bottom of the bed and next to the mattress. The area was so badly damaged, however, the investigator could not determine the precise "point of origin," or the very spot the fire started. "I don't know if the mattress was first ignited or if a piece of paper was first ignited or if a piece of clothing was first ignited."

> "In my opinion, the fire started … right in the bottom corner, next to the mattress. [Y]ou have fire damage along these walls, all the way to the ground. This is some type of furniture that is burnt all the way down to the floor here. You have burn patterns all though this entire wall, indicating that the fire has originated down close to the ground here, so that would indicate … the most damage."

There was evidence of a "flashover" event inside the master bedroom from "the super heating of gases" that simultaneously ignited and burned everything in the room. The mattress was burned down to the metal springs.

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[2] In closing argument, defense counsel stated: "[T]his fire wasn't started by accident, obviously. There is no accidental way to explain a fire in the master bedroom … nothing wrong with the electrical outlets. That was accelerated with gasoline. No way other than arson to explain the presence of gasoline, the extent of the damage in the master bedroom and the gasoline can found in the living room. So this was arson. The fire was started on purpose…. It was arson by someone."

The fire investigator inspected and ruled out electrical outlets, a ceiling fan, and natural gas as possible sources, or any accidental or unintentional incident.

The fire investigator testified a hydrocarbon detector, known as a "sniffer" device, detected the base substance of an ignitable liquid, such as gasoline or butane, in the master bedroom, on samples taken from two walls, the baseboard areas, the edge of the bed, and some debris on the floor. Subsequent laboratory analysis confirmed the presence of an ignitable liquid, consistent with gasoline, in some of the samples taken from the master bedroom.

The fire investigator found a one-gallon red gasoline can with a nozzle in the living room, about 15 to 20 feet from the master bedroom. The can was empty, but the investigator could smell residual gasoline vapor odor. A can of Zippo lighter fluid was on the kitchen counter, about 15 feet from the empty gasoline can.

Ms. Washington testified at trial that she had a red gasoline can that was normally stored in the garage, and it was used for gasoline for the car and the lawn mower.

Defendant's Conduct the Previous Day

Nick Ross's parents lived diagonally across East San Madele from Ms. Washington's house. Ross grew up there and described defendant as an acquaintance. Ross believed defendant lived at the house with his mother, Ms. Washington. Ross was not sure if defendant's sister lived there. Ross thought Ms. Washington's boyfriend also stayed there and testified he had seen different people going in and out of the house at various times.

On March 29, 2011, the day before the fire, Ross was at his parent's house and standing in the front yard. He saw defendant holding a red gasoline can that was approximately one gallon in size. Defendant asked Ross for some gasoline that he could use to light his barbeque. Ross said he did not have any gasoline. Defendant walked away, still holding the gasoline can, and headed to a nearby intersection where a gasoline station was located.

About 15 to 20 minutes later, Ross saw defendant return to the neighborhood, and he was still holding the gas can. Ross said that "the way [defendant] was carrying the gas can, it appeared that the gas can had liquid in it." Ross saw defendant go into Ms. Washington's house with the gasoline can.[3]

Defendant's Conduct at the Time of the Fire

Around 4:30 p.m. on March 30, 2011, Ross was in the front yard of his parents' home with a friend. He did not see anyone around Ms. Washington's house. Ross and his friend suddenly saw smoke coming out of the back of Ms. Washington's house. Ross testified: "From what I remember it was pretty immediate. We just, hey, there is a fire, the house is on fire." The smoke was initially a light charcoal color, and then it became thicker and darker, and came out fast as it billowed out of the house.

Ross testified when he first saw the smoke, he did not see anyone in front of the house, around the house, going in or out of the house, or walking by the house.

Ross called 911 while his friend grabbed a hose and sprayed water in the window of the back bedroom, where the smoke was coming from.

Ross testified that about five minutes after he initially saw the smoke, he was standing in front of Ms. Washington's home and still talking to 911 when he saw defendant run out of the front door of Ms. Washington's house. Ross believed defendant was "[t]rying to get out of the house." Defendant was not holding a gasoline can or anything else. The smoke was still coming out of the back bedroom area, later identified as the master bedroom. Defendant was not yelling or screaming. He was not carrying or

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[3] At trial, Ross testified he could not remember the exact day he saw defendant with the gasoline can but recalled that he gave a statement to a fire investigator about the incident.

Fire Investigator Floyd Wilding testified he interviewed Ross as part of his investigation of the fire. Wilding testified that Ross said he saw defendant with the red gasoline can the day before the fire, and further testified about the details Ross provided about defendant's conduct.

holding anything. Defendant did not tell Ross the house was on fire, say anyone was inside, ask for help, or tell him to call 911.

Ross testified he asked defendant where his dog was. Defendant ran back into the house and returned with the dog within 10 seconds. Defendant walked with his dog towards some nearby apartments, down the block to Third Street. He left the area as the fire continued to burn, and as Ross's friend kept spraying water on the house.

Defendant's Statements During the Fire

The firefighters received the dispatch at 4:29 p.m. and arrived at the scene at approximately 4:33 p.m.

Around 4:50 p.m., Officer Comeyne of the Fresno Police Department arrived to assist with traffic issues while smoke was still coming out of Ms. Washington's house and the firefighters were actively fighting the fire. When she arrived, she saw a man, later identified as defendant, walking from Third Street toward the burning house. Comeyne stopped defendant from going near the structure. Defendant provided his name upon request. Comeyne ran a check on his name and discovered there was a restraining order that prohibited defendant from being at the house.

Officer Comeyne testified she spoke to defendant on the street, outside her patrol car and the fire trucks parked in front of Ms. Washington's house. Comeyne asked defendant a series of questions to which he gave misleading and false responses. Comeyne asked what he was doing at the house. Defendant said it was his residence and he was there to pick up his dog (even though Ross had already seen him leave with the dog before the firefighters arrived). Comeyne asked if he knew about the restraining order. Defendant said he knew that he was not allowed to be at the house, but he was just picking up his dog. Comeyne asked who lived there. Defendant said his mother, her boyfriend, and her daughter lived there. Comeyne asked defendant if his mother knew that he was there. Defendant said yes, and that he had called her earlier.

Officer Comeyne told defendant that she was going to call his mother to find out if that was true. Defendant changed his story and said he had not called his mother, but she knew he was going to be there. Comeyne asked if he had seen his mother that day. Defendant said yes, that he had been riding his bicycle in Clovis "near the weed shop," and she gave him a ride. Comeyne asked what he did with his bicycle. Defendant again changed his story and said he was not actually riding his bicycle around but had been walking.

Office Comeyne testified defendant ultimately said he was not allowed to be at the house and his mother had kicked him out. Comeyne asked defendant if he had been at the house prior to the fire. Defendant said yes, he had been there for an hour prior to the start of the fire, he was alone, and nobody else was in the house.

Officer Comeyne asked defendant where he had been in the house. Defendant first said he had been in the living room. Comeyne asked if he had been in any other rooms. Defendant said he had been in his mother's bathroom. Comeyne asked if his mother's bathroom was located in the master bedroom, and defendant said yes.[4]

Officer Comeyne asked defendant if he set the fire intentionally or accidentally. Defendant said no but said he had been smoking marijuana inside the residence.

Defendant thus admitted he had been the only person in the house before the fire, and he had been in both the living room (where the empty red gasoline can was found, a few feet from the can of lighter fluid), and the master bathroom (that was adjacent to the master bedroom where the fire was ignited). There was no evidence of anyone else outside, inside, or near the house, before, during, or after the fire.

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[4] Garcia, the fire investigator, testified the entrance to the master bathroom was in the hallway, next to the master bedroom.

The Restraining Order

While defendant asserts that the trial evidence showed he and his mother were getting along at the time of the fire, the record suggests otherwise. Ms. Washington testified at trial that she lived in the house with her daughter and "sometimes" defendant.

Ms. Washington testified that in January 2011, just a few weeks before the fire, she obtained a restraining order that prevented defendant from being inside her home, and he could not be within 100 yards of Ms. Washington and her daughter. Ms. Washington obtained the restraining order because "I was afraid of my son sometimes." Ms. Washington testified that when defendant became angry, "I need protection, and I will call the police," but officers previously told her they could not legally remove defendant from the house without a restraining order.

Ms. Washington testified defendant could disagree with her about something little, and he would become angrier than the incident warranted. When he became angry, he would threaten to do something to her, and "he might hit the wall and make a hole in it or – he might do something in his anger, in the moment of his anger that was unacceptable for me." Ms. Washington testified she was scared of defendant when he became "extremely angry," and that was why she obtained the restraining order.

Ms. Washington testified that after she obtained the restraining order, she sometimes let defendant into the house, and allowed him to stay there from time to time.

Defendant's Arrest One Week Before the Fire

Ms. Washington testified that in February and March 2011, her relationship with defendant was good and bad, and she had trouble with him "on and off." On some days, defendant would be disrespectful and challenge her authority as far as what she could do could in her house, and then they would have problems.

On March 23, 2011 (one week before the fire), Ms. Washington returned to her house and found defendant there. She did not expect him to be there and the restraining order was still in effect. Defendant was angry and said she had done something to him.

Defendant threatened to hit Ms. Washington. He did not hit her, but instead he broke a lot of light fixtures with a broom or a mop. Ms. Washington could not reason with him and called the police. She asked the responding officer to arrest defendant. Defendant was arrested and taken to jail.

Ms. Washington's Testimony About Defendant's Release from Jail

Ms. Washington testified that on March 28, 2011, someone at the jail called and told her defendant had been released from custody. Ms. Washington testified she went to the jail, picked up defendant, and took him to her house.

Ms. Washington testified on March 29, 2011, she sat down with defendant and her daughter, they had a family discussion, and they talked about how they could have a good life together and they should not have angry fights. Defendant stayed at the house that night with her permission.

Ms. Washington's Testimony About Staying at the Motel

At trial, Ms. Washington further testified that on the morning of March 30, 2011, she was at the house with defendant and her daughter, and testified defendant was "happy" because of a family discussion they had the previous day. Ms. Washington testified that she decided to spend that night at a hotel with her boyfriend. Ms. Washington did not want her boyfriend at the house with defendant because there would be "some very severe problems" since defendant did not like him, and things had been going well. Ms. Washington's daughter also stayed at the motel that night.

Ms. Washington testified she returned to her house on March 31, 2011, and discovered the fire had occurred. No one had called to tell her.

Ms. Washington's Statements to Officers on the Day After the Fire

In contrast to her trial testimony, Ms. Washington's statements to officers after the fire were far different about her relationship with defendant, and the reason she was not at the house at the time of the fire.

At 4:30 p.m. on March 31, 2011, the day after the fire, a neighbor called the police, said someone was burglarizing Ms. Washington's damaged home, and identified defendant by name.

Officer Bogard testified he responded to the house with Officer Hurley. Hurley found defendant one or two blocks away from the house. Hurley escorted him back to the house. Defendant smelled of smoke.

Officer Bogard testified that as they were talking with defendant, Ms. Washington arrived at the house and discovered for the first time that there had been a fire at her house. She was very upset, surprised, and in disbelief about the fire. Ms. Washington was also upset defendant was there. Bogard testified Ms. Washington "seemed upset and afraid by both of those things," referring to the fire and defendant's presence.

Officer Bogard testified Ms. Washington said she had been away for a couple of days and that was why she did not know about the fire. Ms. Washington said defendant had been arrested on March 23, 2011 and released from jail on March 28.

In contrast to her subsequent trial testimony, Ms. Washington told Officer Bogard that when she found out defendant was being released from jail, "[o]ut of fear of her son being released from jail, she left her home" on March 28, 2011, "and went and stayed somewhere else," at a boyfriend's house. She later went to her sister's house and then stayed in a hotel. Ms. Washington said she had not been to her house since she left on March 28, 2011.

Officer Bogard testified Ms. Washington "was very afraid and upset by the fact that [defendant] was there" and never said she had reconciled with him.[5]

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[5] At trial, Ms. Washington testified she recalled giving statements to officers after the fire, but claimed she had been misunderstood, she did not make some of the statements, and denied that she left the house after defendant was released from jail because she was afraid of him. Thereafter, the People introduced evidence about Ms. Washington's pretrial statements.

Officer Bogard testified that "[c]onsidering the circumstances, you know, the fire at his mother's home, the fact that his mother is upset, just kind of with all the circumstances [defendant] seemed a bit cavalier and just kind of like … indifferent."

Ms. Washington's Statements to the Fire Investigator

Fire Investigator Wilding testified that when he was investigating the fire, he interviewed Ms. Washington. Her statements to Wilding further undermined defendant's claims to Officer Comeyne about their relationship and his actions on the day of the fire.

Fire Investigator Wilding asked Ms. Washington if she gave defendant permission to be at her house on the day of the fire. Ms. Washington said she could not remember "ever giving [defendant] permission to be there." Wilding asked if she had been to "the weed shop" in Clovis and saw defendant there on the day of the fire. Ms. Washington said no, she had not been to any kind of shop, and she did not see defendant on the day of the fire. She might have told defendant that she was not going to be home, but "she never saw him or gave him permission to be there." Ms. Washington never said they had a family meeting or she had reconciled with defendant the night before the fire.

D. Defendant's Arguments

Defendant contends the court's evidentiary error was prejudicial because evidence about the prior act "took up a considerable portion of the trial." Defendant asserts his mother testified that he had been in "a happy mood that day and that she permitted him to be at the house." Defendant argues the charges in the instant case were "far more serious than the prior incident and arguably led the jury to believe that the two incidents were related."

By comparison, however, the People's evidence about Ms. Washington's fear of defendant, the reasons she obtained the restraining order, why she left her house after he was released from jail, and her reaction upon finding out about his presence and the fire – all of which happened shortly before and immediately after the March 2011 fire – was far more extensive and damaging, compared to the People's evidence about defendant's prior

incident with the barbeque and the gasoline that occurred nearly one year earlier, in June 2010.

During trial, Ms. Washington partially testified about her fear of defendant and the reasons she obtained the restraining order. However, her trial claim that they had reconciled the night before the fire was undermined by her statements to the officers after the fire. The People introduced evidence about her prior inconsistent statements regarding her fear of defendant, she fled the house upon learning he was being released from jail just days before the fire, she was upset to learn about both the fire and defendant's presence, and she never said they had reconciled.

Defendant argues the case against him was entirely circumstantial, "based on his presence in the house when the fire started and the fire investigator's report." While no one saw defendant ignite a fire inside the house, the circumstantial evidence was extremely strong that he started the fire, completely independent of the prior acts evidence. Ross encountered defendant, as he asked to fill a red gasoline can the day before the fire. Defendant returned to the neighborhood holding what appeared to be a heavier can and went into the house with it, an empty red gasoline was found in the living room after the fire, the fire investigator could smell residual gasoline vapor odor from the can, and lighter fluid was found about 15 feet from the empty gasoline can. Ms. Washington testified she kept a similar red gasoline can in the garage.

Defendant asserts his conduct "during and after the fire did not indicate that he had committed arson," because he ran into the house to save his dog, and he returned "a few minutes later while authorities were still there and agreed to speak to the police." The record belies the factual basis for these assertions. Ross testified that after defendant retrieved his dog, he walked away from the burning house and went toward some apartments. Defendant left his mother's burning house as Ross called 911 and Ross's friend was trying to control the fire with a water hose. The firefighters received the dispatch at 4:29 p.m. and arrived at the scene at approximately 4:33 p.m. Around 4:50

p.m., Officer Comeyne saw defendant walk up to the burning house as the firefighters were still fighting the blaze.

Upon being questioned by Officer Comeyne, defendant repeatedly gave false statements about the restraining order, whether he could be at the house, why he was there, and if his mother knew he was there. In response to Comeyne's questions, defendant initially claimed he lived there, and he was picking up his dog, even though Ross had already seen defendant leave with the dog before the firefighters arrived. When challenged about whether his mother knew he was there, defendant claimed he called her earlier, and then changed his story and said he had not called his mother, but she knew he was going to be there because he saw her while riding his bicycle near a "weed shop" in Clovis, and she gave him a ride. He could not explain the whereabouts of a bicycle, and then said he was not actually riding his bicycle around but had been walking. Defendant ultimately admitted he had been smoking marijuana in the house, no one else had been there, and he had been in both the living room, where the empty red gasoline can was found, and the master bathroom, that was adjacent to the master bedroom where the fire was ignited.

Defendant's multiple inconsistent statements and falsehoods about whether his mother gave permission for him to be at the house, and his ultimate admission that he was the only person inside immediately before the fire, provide additional strong circumstantial evidence that he started the fire.

Defendant further argues the court's evidentiary error was prejudicial because the prosecutor "relied very heavily on this incident in her closing argument. The prosecutor in fact argued that the barbeque incident was 'a way of asserting himself against his mom' both as a motive and common plan to hurt his mother." Defendant contends it was "reasonably likely" the jury followed the court's instruction and the prosecutor's argument to rely on the erroneously admitted evidence to convict defendant of the charged offense.

A review of the entirety of closing argument presents a different picture. In the initial closing argument, the prosecutor extensively addressed the circumstantial evidence that supported defendant's culpability as the arsonist, reviewed the elements of the offense. While the prosecutor primarily focused on this issue, the prosecutor also addressed the prior incident in 2010, where defendant used the gasoline to ignite the barbeque, and argued that his prior conduct supported the inference that he used gasoline as the accelerant.

Defense counsel used his closing argument to concede the fire was arson, it likely started in the master bedroom, and gasoline was used as the accelerant, as described by the fire inspector. Counsel then argued there was no evidence about who started it and claimed the fire could have been started by Ross or someone who saw defendant walk back into the house with a full can of gasoline. Counsel also questioned whether defendant's sister had a motive to set the fire and wondered about her whereabouts that day, and cited Ross's testimony about seeing numerous people go in and out of the house in the past.

Defense counsel also addressed the prior incident when defendant used the gasoline to try and start the barbeque, and argued the arson fire of his mother's house was on a far larger scale than that prior incident, he had learned from the prior incident about the danger of using gasoline, and just because he had once behaved irresponsibly with gasoline did not mean he intentionally set his mother's house on fire.

In rebuttal, the prosecutor refuted counsel's claim about a "mystery" arsonist, pointed to defendant's admission to Officer Comeyne that he had been in the house just before the fire and no one else was there, and Ms. Washington's claims about a reconciliation were refuted by her statements to the officers. The prosecutor also acknowledged the arson fire was larger than the prior incident with the barbeque, but that was why he ran out of the house after it started. The prosecutor further argued defendant

had already tried to harm his mother when he used gasoline on the barbeque, and this incident was in line with that prior incident.

The entirety of closing argument shows that while the prosecutor addressed the prior incident with the gasoline, it was not the focus of his case and was instead intended to refute defense counsel's argument that the prior incident had no relationship to the current charge of arson.

While counsel may have made a tactical decision about how to address the prior act evidence, counsel also decided not to challenge the People's evidence that the fire was intentionally started with gasoline and originated in the master bedroom. Indeed, the evidence of an intentional fire set with gasoline was overwhelming. Instead, counsel was forced – not by the prior acts evidence, but by the undisputed evidence of an intentional fire – to urge the jury to focus on Ross, defendant's sister, various people who Ross had previously seen walk in and out of the house, and/or an unknown person as the probable arsonist, who managed to escape before the firefighters and police arrived.[6]

E. Conclusion

While the trial court improperly admitted evidence of defendant's prior act in 2010, I believe that the error is not prejudicial because it is not reasonably likely a result more favorable to defendant would have occurred in the absence of the error, since the evidence in support of the judgment, as set forth above, is "so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 177.)

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POOCHIGIAN, Acting P.J.

[6] Defendant has not raised an ineffective assistance claim on appeal.